

1 Merle N. Schneidewind
2 California State Bar No. 58242
3 Attorney at Law
4 555 Saturn Blvd, Suite B504
5 San Diego CA 92154
6 Telephone: (619) 575-2120
7 Fax: (619) 575-2170

8 Attorney For:
9 Pedro R. Arce-Fox,
10 aka Marko Oswaldo Ortega-Tapia,

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
HONORABLE JUDGE JEFFREY T. MILLER

UNITED STATES OF AMERICA,) Case No. 08-CR-2195-JM
Plaintiff,) Motion to Compel Discovery
v.) and Points and Authorities
PEDRO R. ARCE-FOX) Date: Aug. 8, 2008
AKA MARKO OSWALDO ORTEGA-TAPIA) Time: 11:00 a.m.
Defendant)
-----)

INTRODUCTION

Beginning on an unknown date Pedro Arce-Fox, aka, Marko Oswaldo-Tapia within the Southern District of California, and elsewhere, defendant Sergio Preciado-Diaz with the intent to violate the immigration laws of the United States did knowingly and intentionally conspire with others to do so.

POINTS AND AUTHORITIES

GENERAL DISCOVERY

I.

MOTION TO COMPEL DISCOVERY AND PRESERVE EVIDENCE

1 Defendant moves for the production by the government of the following discovery
2 and for the preservation of evidence. This request is not limited to those items that the
3 prosecutor knows of, but rather includes all discovery listed below that is in the custody,
4 control, care, or knowledge of any government agency. See generally Kyles v. Whitley, 514
5 U.S. 419 (1995); United States v. Bryan, 868 F.2d 1032 (9th Cir. 1989).

6 (1) The Defendant's Statements. The Government must disclose to the defendant all
7 copies of any written or recorded statements made by the defendant; the substance of any
8 statements made by the defendant which the Government intends to offer in evidence at trial;
9 any response by the defendant to interrogation; the substance of any oral statements which the
10 Government intends to introduce at trial and any written summaries of the defendant's oral
11 statements contained in the handwritten notes of the Government agent; any response to any
12 Miranda warnings which may have been given to the defendant; as well as any other statements
13 by the defendant. Fed. R. Crim. P. 16(a)(1)(A) and (B). The Advisory Committee Notes and
14 the 1991 amendments to Rule 16 make clear that the Government must reveal all the
15 defendant's statements, whether oral or written, regardless of whether the government intends
16 to make any use of those statements.

17 (2) Arrest Reports, Notes and Dispatch Tapes. The defense also specifically requests
18 that all arrest reports, notes and dispatch or any other tapes that relate to the circumstances
19 surrounding his arrest or any questioning, if such reports have not already been produced in
20 their entirety, be turned over. This request includes, but is not limited to, any rough notes,
21 records, reports, transcripts or other documents in which statements of the defendant or any
22 other discoverable material is contained. Such material is discoverable under Fed. R. Crim. P.
23 16(a)(1)(A) and (B) and Brady v. Maryland, 373 U.S. 83 (1963). See also Loux v.
24 United States, 389 F.2d 911 (9th Cir. 1968). Arrest reports, investigator's notes, memos from
25 arresting officers, dispatch tapes, sworn statements, and prosecution reports pertaining to the
26 defendant are available under Fed. R. Crim. P. 16(a)(1)(B), Fed. R. Crim. P. 26.2, and Fed. R.

1 Crim. P. 12(h). Preservation of rough notes is requested, whether or not the government deems
2 them discoverable.

3 (3) Brady Material. Defendant requests all documents, statements, agents' reports, and
4 tangible evidence favorable to the defendant on the issue of guilt and/or which affects the
5 credibility of the government's case. Under Brady, impeachment as well as exculpatory
6 evidence falls within the definition of evidence favorable to the accused. United States v.
7 Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976).

8 (4) Any Information That May Result in a Lower Sentence Under The Guidelines. As
9 discussed above, this information is discoverable under Brady v. Maryland, 373 U.S. 83 (1963).
10 This request includes any cooperation or attempted cooperation by the defendant, as well as any
11 information that could affect any base offense level or specific offense characteristic under
12 Chapter Two of the Guidelines. Also included in this request is any information relevant to a
13 Chapter Three adjustment, to a determination of the defendant's criminal history, or to any other
14 application of the Guidelines.

15 (5) Any Information That May Result in a Lower Sentence Under 18 U.S.C. § 3553.
16 After *United States v. Booker*, 543 U.S. ___, 125 S. Ct. 738 (2005), the Guidelines are merely
17 advisory and federal sentencing is governed by 18 U.S.C. § 3553, which requires a judge to
18 consider "any information about the nature of the circumstances of the offense." 18 U.S.C. §
19 3553(a)(1). This broad range of judicial discretion, combined with the mandate that "[no
20 limitation shall be placed on the information concerning the background, character, and conduct
21 of a person convicted of an offense which a court of the United States may receive and consider
22 for the purpose of imposing an appropriate sentence," 18 U.S.C. § 3661, means that any
23 information whatsoever may be "material ... to punishment," Brady, 373 U.S. at 87, whether
24 or not the government deems it discoverable.

25 (6) The Defendant's Prior Record. Evidence of prior record is available under Fed. R.
26 Crim. P. 16(a)(1)(D). Counsel specifically requests that the copy be complete and legible.

1 (7) Any Proposed 404(b) Evidence. Evidence of prior similar acts is discoverable under
2 Fed. R. Crim. P. 16(a)(1)(E) and Fed. R. Evid. 404(b) and 609. In addition, under Fed. R.
3 Evid. 404(b), "upon request of the accused, the prosecution . . . shall provide reasonable notice
4 in advance of trial . . . of the general nature . . ." of any evidence the government proposes to
5 introduce under Fed. R. Evid. 404(b) at trial. The defendant requests that such notice be given
6 three weeks before trial in order to give the defense time to adequately investigate and prepare
7 for trial.

8 (8) Evidence Seized. Evidence seized as a result of any search, either warrant less or
9 with a warrant, is discoverable under Fed. R. Crim. P. 16(a)(1)(E).

10 (9) Request for Preservation of Evidence. The defense specifically requests that all
11 dispatch tapes or any other physical evidence that may be destroyed, lost, or otherwise put out
12 of the possession, custody, or care of the government and which relate to the arrest or the
13 events leading to the arrest in this case be preserved. This request includes, but is not limited
14 to, the results of any fingerprint analysis, alleged narcotics, the defendant's personal effects, the
15 vehicle, and any other evidence seized from the defendant, or any third party. It is requested
16 that the government be ordered to question all the agencies and individuals involved in the
17 prosecution and investigation of this case to determine if such evidence exists, and if it does
18 exist, to inform those parties to preserve any such evidence.

19 (10) Tangible Objects. The defense requests, under Fed. R. Crim. P. 16(a)(1)(E) the
20 opportunity to inspect and copy as well as test, if necessary, all other documents and tangible
21 objects, including photographs, books, papers, documents, photographs of buildings or places
22 or copies of portions thereof which are material to the defense or intended for use in the
23 government's case-in-chief or were obtained from or belong to the defendant.

24 (11) Evidence of Bias or Motive to Lie. The defense requests any evidence that any
25 prospective government witness is biased or prejudiced against the defendant, or has a motive
26 to falsify or distort his or her testimony. Pennsylvania v. Ritchie, 480 U.S. 39 (1987);

1 United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988).

2 (12) Impeachment evidence. Defendant requests any evidence that any prospective
3 government witness has engaged in any criminal act whether or not resulting in a conviction and
4 whether any witness has made a statement favorable to the defendant. See Fed. R. Evid. 608,
5 609 and 613. Such evidence is discoverable under Brady v. Maryland. See United States v.
6 Strifler, 851 F.2d 1197 (9th Cir. 1988) (witness' prior record); Thomas v. United States, 343
7 F.2d 49 (9th Cir. 1965) (evidence that detracts from a witness' credibility).

8 (13) Evidence of Criminal Investigation of Any Government Witness. The defense
9 requests any evidence that any prospective witness is under investigation by federal, state or
10 local authorities for any criminal conduct. United States v. Chitty, 760 F.2d 425 (2d Cir. 1985).

11 (14) Evidence Affecting Perception, Recollection, Ability to Communicate. Defendant
12 requests any evidence, including any medical or psychiatric report or evaluation, tending to
13 show that any prospective witness's ability to perceive, remember, communicate, or tell the truth
14 is impaired; and any evidence that a witness has ever used narcotics or other controlled
15 substance, or has ever been an alcoholic. United States v. Strifler, 851 F.2d 1197 (9th Cir.
16 1988); Chavis v. North Carolina, 637 F.2d 213, 224 (4th Cir. 1980).

17 (15) Witness Addresses. The defense requests the name and last known address of each
18 prospective government witness. See United States v. Napue, 834 F.2d 1311 (7th Cir. 1987);
19 United States v. Tucker, 716 F.2d 576 (9th Cir. 1983) (failure to interview government
20 witnesses by counsel is ineffective); United States v. Cook, 608 F.2d 1175, 1181 (9th Cir.
21 1979), overruled on other grounds by Luce v. United States, 469 U.S. 38 (1984) (defense has
22 equal right to talk to witnesses). The defendant also requests the name and last known address
23 of every witness to the crime or crimes charged (or any of the overt acts committed in
24 furtherance thereof) who will not be called as a government witness. United States v. Cadet,
25 727 F.2d 1453 (9th Cir. 1984).

26 (16) Name of Witnesses Favorable to the Defendant. The defense requests the name of
27 any witness who made any arguably favorable statement concerning the defendant or who could
28 not identify him or who was unsure of his identity, or participation in the crime charged.

1 Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968); Chavis v. North Carolina, 637 F.2d 213,
2 223 (4th Cir. 1980); Jones v. Jago, 575 F.2d 1164, 1168 (6th Cir. 1978); Hudson v. Blackburn,
3 601 F.2d 785 (5th Cir. 1979).

4 (17) Statements Relevant to the Defense. The defense requests disclosure of any
5 statement that may be "relevant to any possible defense or contention" that he might assert.
6 United States v. Bailleaux, 685 F.2d 1105 (9th Cir. 1982). This would include Grand Jury
7 transcripts which are relevant to the defense motion to dismiss the indictment.

8 (18) Jencks Act Material. The defense requests all material to which defendant is
9 entitled pursuant to the Jencks Act, 18 U.S.C. § 3500, reasonably in advance of trial, including
10 dispatch tapes. A verbal acknowledgment that "rough" notes constitute an accurate account of
11 the witness' interview is sufficient for the report or notes to qualify as a statement under
12 § 3500(e)(1). Campbell v. United States, 373 U.S. 487, 490-92 (1963).

13 (19) Giglio Information. Pursuant to Giglio v. United States, 405 U.S. 150 (1972), the
14 defendant requests all statements and/or promises, expressed or implied, made to any
15 government witnesses, in exchange for their testimony in this case, and all other information
16 which could arguably be used for the impeachment of any government witnesses.

17 (20) Reports of Scientific Tests or Examinations. Pursuant to Fed. R. Crim. P.
18 16(a)(1)(F), the defendant requests the reports of all tests and examinations conducted upon the
19 evidence in this case. Including, but not limited to, any fingerprint testing done upon any
20 evidence seized in this case, that is within the possession, custody, or control of the
21 government, the existence of which is known, or by the exercise of due diligence may become
22 known, to the attorney for the government, and which are material to the preparation of the
23 defense or are intended for use by the government as evidence in chief at the trial.

24 (21) Henthorn Material. The defendant requests that the prosecutor review the
25 personnel files of the officers involved in his arrest, and those who will testify, and produce to
26 him any exculpatory information at least two weeks prior to trial and one week prior to the
27 motion hearing. This includes all citizen complaints and other related internal affairs documents
28 involving any of the immigration officers or other law enforcement officers who were involved

1 in the investigation, arrest and interrogation of defendant. See United States v. Henthorn, 931
2 F.2d 29 (9th Cir. 1991). In addition, he requests that if the government is uncertain whether
3 certain information is to be turned over pursuant to this request, that it produce such
4 information to the Court in advance of the trial and the motion hearing for an in camera
5 inspection.

6 (22) Informants and Cooperating Witnesses. The defense requests disclosure of the
7 names and addresses of any informants or cooperating witnesses used or to be used in this case.
8 The government must disclose the informant's identity and location, as well as disclose the
9 existence of any other percipient witness unknown or unknowable to the defense. Roviaro v.
10 United States, 353 U.S. 53, 61-62 (1957). The defense also requests disclosure of any
11 information indicating bias on the part of any informant or cooperating witness. Giglio v.
12 United States, 405 U.S. 150 (1972). Such information would include what, if any, inducements,
13 favors, payments, or threats were made to the witness to secure cooperation with the
14 authorities.

15 (23) Expert Witnesses. Pursuant to Fed. R. Crim. P. 16(a)(1)(G), the defendant
16 requests a written summary of the expert testimony that the government intends to use at trial,
17 including a description of the witnesses' opinions, the bases and the reasons for those opinions,
18 and the witnesses' qualifications.

19 (24) Residual Request. The defense intends by this discovery motion to invoke his
20 rights to discovery to the fullest extent possible under the Federal Rules of Criminal Procedure
21 and the Constitution and laws of the United States. This request specifically includes all
22 subsections of Rule 16. Defendant requests that the government provide him and his attorney
23 with the above requested material sufficiently in advance of trial.

24
25 Date: July 16, 2008

\s\ Merle N. Schneidewind

26
27
28 Merle N. Schneidewind
Attorney for the Defendant
Pedro R. Arce-Fox
aka: Marko Oswaldo Ortego-Tapia

Merle N. Schneidewind
California State Bar No. 58242
Attorney at Law
555 Saturn Blvd, Suite B504
San Diego CA 92154
Telephone: (619) 575-2120
Fax: (619) 575-2170
email: atymerle@pacbell.net

Attorney For: Pedro R. Arce-Fox
aka Marka Oswaldo Ortega-Tapia

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
HONORABLE JEFFREY T. MILLER**

UNITED STATES OF AMERICA
Plaintiff.

Case No: 08-CR-2195-JM

Pedro R. Arce-Fox
aka Marka Oswaldo Ortega Tapia

CERTIFICATE OF SERVICE

Defendant. }

}

IT IS HERBRY CERTIFIED

IT IS HEREBY CERTIFIED

schneidewind am a citizen of

Chiedewind, am a citizen of

My business address is 555

My business address is

I am not a party to the above

PRINTED IN U.S.A. BY THE GPO

Sentencing Summary Chart

with the Clerk of the District

notifies them:

Paul L. Starita, U S Attorney's Office

Paul.Starita@usdoj.gov

1 I declare under penalty of perjury that the foregoing is true and correct.
2
3 Executed on July 17. 2008
4
5 /s/ Merle N. Schneidewind
6 Merle N. Schneidewind
7 Attorney for Defendant
8 Pedro R. Arce-Fox
aka Marka Oswaldo Ortega-Tapia
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Merle N. Schneidewind
California State Bar No. 58242
Attorney at Law
555 Saturn Blvd, Suite B504
San Diego CA 92154
Telephone: (619) 575-2120
Fax: (619) 575-2170

Attorney For:
Pedro R. Arce-Fox
aka Marko Oswaldo Ortega-Tapia

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
HONORABLE JUDGE JEFFREY T. MILLER

TO: CAROL LAM, UNITED STATES ATTORNEY, and
LUELLA M. CALDITO, ASSISTANT UNITED STATES ATTORNEY

PLEASE TAKE NOTICE that on August 8, 2008 at 11:00 am or as soon thereafter as counsel may be heard, defendant, Pedro R. Arce-Fox, by and through his attorney, Merle N. Schneidewind, will ask this Court to enter an order granting the above referenced motion.

Respectfully Submitted;

Date /s/ Merle N. Schneidewind

Merle N. Schneidewind
Attorney for Defendant
Pedro R. Arce-Fox
aka Marko Oswaldo Ortega-Tapia